

1 KAREN A. OVERSTREET
Chief Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
4

5 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 In re)
) Chapter 7
8 JOON SIK KIM and)
YOON KYUNG KIM,)
9)
Debtors.)
10) Bankruptcy No. 10-10665
)
11 _____)
)
12 TONY'S TRADING, INC.,) Adversary No. 10-01062
)
13 Plaintiff.)
14)
v.) **MEMORANDUM DECISION**
15)
JOON SIK KIM and)
16 YOON KYUNG KIM,) **NOT FOR PUBLICATION**
)
17)
Defendants.)
18 _____)

19 This matter came before me for trial on June 10, 2010. Joon
20 and Yoon Kim appeared pro se at the hearing with the assistance of
21 their son, Min Kim, who is not an attorney. Plaintiff, Tony's
22 Trading, Inc., appeared through its counsel. This Memorandum
23 Decision contains the Court's findings of fact and conclusions of
24 law for purposes of Bankruptcy Rule 7052. Jurisdiction of this
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1 matter is proper under 28 U.S.C. §§ 157 and 1334 and this is a core
2 proceeding under 28 U.S.C. § 157(b)(2)(I).¹

3 For the following reasons, the Court finds in favor of
4 defendants and any obligation they owe to plaintiff is discharged.

5 I. BACKGROUND

6 Plaintiff brings this matter under Sections 523(a)(2), (a)(4),
7 and (a)(6) to except from discharge a debt alleged in the amount of
8 approximately \$75,000. Plaintiff alleged in the complaint that it
9 had obtained a default judgment in state court against defendants
10 in this amount, but plaintiff presented no evidence at trial of
11 such a judgment.

12 II. FINDINGS OF FACT

13 Plaintiff began business 13 years ago as a wholesale seller of
14 various products, including cigarettes, to wholesale grocery stores
15 and gas stations primarily in Washington state. Tony Liu,
16 plaintiff's president, testified that plaintiff sells approximately
17 200 different products to approximately 200 customers. In 2005 or
18 2006 (the testimony was unclear), defendant Joon Kim was hired as a
19 salesman for plaintiff. Mr. Kim is Korean born with limited
20 English speaking ability. He came to the United States in 1998
21 from Korea, where he had achieved a masters degree and was working
22 as a stock broker. He had never worked as a salesman before being
23 hired by plaintiff.

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25
26 ¹ Unless otherwise indicated, all Code, Chapter, Section and
27 Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001 *et seq.*

1 In exchange for the payment of a base salary and commissions
2 on sales, Mr. Kim took merchandise from plaintiff's warehouse,
3 carried it in a truck owned by plaintiff, and delivered the
4 merchandise to customers of plaintiff. Mr. Kim called on
5 established customers of plaintiff and was also expected to solicit
6 new customers for plaintiff's business. Mr. Liu testified that
7 when Mr. Kim was hired, he was given 70-80 existing customers to
8 service. Mr. Kim testified that he built up the number of
9 customers he serviced to between 100 and 130 customers.

10 Initially, Mr. Kim was paid \$1,000 as a base salary plus a
11 commission of 13% on sales of more than \$10,000 per month. Mr. Kim
12 also received reimbursement of his out-of-pocket expenses such as
13 gas, meals, and lodging. Weekly or daily, Mr. Kim was given
14 merchandise from plaintiff's warehouse and an invoice was prepared
15 showing the number of items, the unit cost and the total. Each
16 invoice also showed an amount listed as "Consignment" which was
17 either added to or subtracted from the inventory balance. The
18 amount shown on each invoice as "Total Paid" represented the amount
19 of merchandise that had been sold by Mr. Kim and therefore applied
20 as a credit to the total. The invoices were prepared by
21 plaintiff's warehouse employee. Plaintiff put into evidence Ex. P-
22 9, which contains these invoices from May 31, 2008 to October 31,
23 2008.

24 Because all of the inventory could not be sold in one day,
25 Mr. Kim was permitted to keep the merchandise in his truck.
26 Mr. Liu testified that if the truck was full, Mr. Kim could have as
27 much as \$30,000 to \$40,000 in inventory stored in the truck at any
28 given time. When Mr. Kim sold merchandise, he submitted

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1 plaintiff's form of invoice to the customer and collected checks
2 (made payable to plaintiff) and cash to be turned over to
3 plaintiff. Mr. Kim testified that during the term of his
4 employment, he paid over all checks and cash he received from
5 customers to plaintiff, and plaintiff did not dispute that
6 testimony.

7 By September of 2006, there was a discrepancy between the
8 amount of merchandise plaintiff claimed to have given Mr. Kim and
9 the amount that Mr. Kim could account for in his truck. Both
10 Mr. Kim and Mr. Liu testified that the amount of the discrepancy
11 was \$13,000. Mr. Kim testified that the discrepancy was explained
12 by his delivery of free samples of merchandise to prospective
13 customers and free merchandise given to good customers as a reward
14 for their continued business. Mr. Liu did not dispute that
15 testimony. Mr. Liu wanted Mr. Kim to pay the amount of the
16 discrepancy. Unable to pay, Mr. and Mrs. Kim signed a deed of
17 trust against their condominium in favor of plaintiff to secure
18 repayment of the amount owed. Ex. P-4. The deed of trust,
19 however, states that it secures \$23,505. Mr. Liu explained that
20 although only \$13,000 was owed at the time, he wanted to have "some
21 cushion." Mr. Liu testified that he changed Mr. Kim's compensation
22 after September of 2006, paying him only a commission of 13% on all
23 merchandise sold with no base salary because Mr. Kim could "no
24 longer be trusted." In addition, he required Mr. Kim to begin
25 paying \$500 per month for the use of plaintiff's truck and \$170 per
26 month for insurance.

27 Mr. Kim testified that he felt he could never get ahead while
28 in plaintiff's employ. He felt that the more merchandise he sold,

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1 the more he owed the plaintiff. He claimed that the invoices in
2 Ex. P-9 contained not just the amount of inventory he had been
3 given, but also interest, product markups, and charges for the
4 truck and insurance. Mr. Kim signed each of the invoices in
5 Ex. P-9, except for the last invoice dated October 31, 2008.

6 Mr. Kim decided to quit working for plaintiff in October 2008.
7 Mr. Liu testified that the invoice in Exhibit P-9 dated October 31,
8 2008, documents the final balance owed by Mr. Kim for inventory he
9 had been issued for sale. According to Mr. Liu, the October 31,
10 2008 invoice reflects a carry over balance owed by Mr. Kim of
11 \$75,523.16, plus \$4,196 as a "consignment", less \$5,114.37 in
12 inventory returned. Mr. Liu contends the balance of \$74,604.86 is
13 owed by Mr. Kim and is nondischargeable.

14 Mr. Kim testified that in addition to the \$13,000 in inventory
15 he knows he was short from 2006, he lost an additional \$25,000 in
16 inventory in two separate thefts from his truck. According to him,
17 one theft occurred in 2006 and the other in 2008. In one incident,
18 his truck was broken into during the night and in the other
19 incident his merchandise was stolen from his unlocked truck while
20 he was parked at a customer's location. He reported only the night
21 time theft to the police and reported that theft also to Mr. Liu a
22 couple of months after it occurred. He did not report the theft
23 from the customer's location to the police or to Mr. Liu. Mr. Liu
24 testified that had Mr. Kim reported the thefts, he could have
25 recovered some or all of the value of the inventory from insurance.

26 **III. CONCLUSIONS OF LAW**

27 Based upon the foregoing findings of fact, the Court makes the
28 following conclusions of law. The plaintiff has the burden of

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1 proving each element of Section 523 by a preponderance of the
2 evidence. *Grogan v. Garner*, 298 U.S. 279, 111 S.Ct. 654, 112
3 L.Ed.2d 755 (1991). Exceptions to discharge, however, are to be
4 construed strictly against the objecting creditor and liberally in
5 favor of debtor. *In re Linn*, 38 B.R. 762 (Bankr. 9th Cir. 1984).

6 A. Section 523(a)(2) - Fraud.

7 To prove fraud under Section 523(a)(2)(A), plaintiff must
8 prove the following elements:

- 9 (1) a representation of fact by the debtor;
- 10 (2) that was material;
- 11 (3) that the debtor knew at the time to be false;
- 12 (4) that the debtor made with the intention of
- 13 deceiving the creditor;
- 14 (5) upon which the creditor relied;
- 15 (6) that the creditor's reliance was justifiable; and
- 16 (7) that damage proximately resulted from the
- 17 misrepresentation.

18 *In re Siriani*, 967 F.2d 302 (9th Cir. 1992). Plaintiff failed to
19 present proof of any false representation made by defendants.

20 Accordingly, I find that plaintiff is not entitled to a judgment of
21 nondischargeability under Section 523(a)(2).

22 B. Section 523(a)(4) - Fraud While Acting as a Fiduciary,
23 Embezzlement, Larceny.

24 1. Fiduciary Capacity.

25 To prove fraud or defalcation while acting in a fiduciary
26 capacity, a plaintiff must show that the defendant was a fiduciary
27 to whom funds were entrusted. The burden then shifts to the
28 fiduciary to account fully for all funds received for the

1 plaintiff's benefit by establishing that he complied with his
2 fiduciary duties as to all questioned transactions. The meaning of
3 "fiduciary" under Section 523(a)(4) is an issue of federal law.
4 "Section 523(a)(4) excludes constructive, resulting or implied
5 trusts. A fiduciary relationship for purposes of § 523(a)(4)
6 exists only where there is an express or statutory trust. *In re*
7 *Aubrey*, 111 B.R. 268, 275 (9th Cir. BAP 1990); see also *In re*
8 *Pedrazzini*, 644 F.2d 756, 758 n. 2(9th Cir. 1981)." *In re Martin*,
9 161 B.R. 672, 676 (9th Cir. BAP 1993). Courts must look to state
10 law to determine whether the requisite trust relationship exists.
11 "The statute must define the trust res, spell out the trustee's
12 fiduciary duties and impose a trust prior to and without reference
13 to the wrong which created the debt." *In re Baird*, 114 B.R. 198,
14 202 (9th Cir. BAP 1990).

15 In this case, the relationship between plaintiff and Mr. Kim
16 was that of employer and employee. Mr. Kim was a salesman for
17 plaintiff and no more. He was not acting in a fiduciary capacity
18 for purposes of Section 523(a)(4) thus the plaintiff is not
19 entitled to a judgment of nondischargeability on that basis.²

20 2. Embezzlement.

21 Embezzlement under Section 523(a)(4) is the fraudulent
22 appropriation of property by a person to whom such property has
23 been entrusted, or into whose hands it has lawfully come. More
24 specifically, the elements of an embezzlement claim do not require
25 that the actor be a fiduciary. To prove embezzlement, plaintiff
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27 ² Mr. Kim contended that he was not an employee, but rather
28 an independent salesman servicing his own clients. All of the
evidence, however, proves otherwise.

1 must show that it entrusted its inventory to Mr. Kim, Mr. Kim
2 appropriated the inventory for a use other than that for which it
3 was entrusted, and the circumstances indicate fraud. *Clark &*
4 *Gregory, Inc. v. Hanson (In re Hanson)*, 225 B.R. 366, 374 (Bankr.
5 W.D. Mich. 1998); *Brady v. McAllister (In re Brady)*, 101 F.3d 1165,
6 1172-73 (6th Cir. 1996). Mere negligence does not indicate the
7 kind of fraud necessary for a case of embezzlement.

8 There was no fraud indicated by Mr. Kim's giving of samples to
9 customers, and plaintiff did not argue that was an impermissible
10 way to solicit customers. Further, although plaintiff may dispute
11 that Mr. Kim lost inventory as a result of thefts, there was no
12 evidence that Mr. Kim stole the inventory or used any of it for his
13 own use. Consequently, I conclude that plaintiff has failed to
14 prove embezzlement.

15 3. Larceny.

16 "Larceny is the fraudulent and wrongful taking and carrying
17 away of the property of another with intent to convert the property
18 to the taker's use without the consent of the owner." 4 L.P King,
19 *Collier on Bankruptcy*, ¶ 523.10[2] at 523-76 (15th ed. rev. 1998).
20 In contrast to embezzlement, "for a larceny claim, the felonious
21 intent must have existed at the time of the taking." *Id.*

22 Larceny does not apply to the facts of this case, however,
23 because the plaintiff's inventory was entrusted to Mr. Kim and not
24 taken by him without the consent of plaintiff.

25 C. Section 523(a)(6) - Conversion, Malicious Injury.

26 Proof of a cause of action under Section 523(a)(6) requires a
27 two step process. First, plaintiff must prove that Mr. Kim
28 committed a "willful" injury. *Khaligh v. Hadaegh (In re Khaligh)*,

1 338 B.R. 817, 831 (9th Cir. BAP 2006). To satisfy the willfulness
2 element, a creditor must prove that the debtor deliberately or
3 intentionally injured the creditor, and that in doing so, the
4 debtor intended not just to commit the act itself, but also
5 intended the consequences of the act. See *Kawaauhau v. Geiger*, 523
6 U.S. 57, 61-62 (1998). Further, the Court must apply a subjective
7 test in determining the debtor's intent. "[Section] 523(a)(6)
8 renders a debt nondischargeable when there is either a subjective
9 intent to harm, or a subjective belief that harm is substantially
10 certain." *Carillo v. Su (In re Su)*, 290 F.3d 1140, 1144 (9th Cir.
11 2002).

12 The second step in the Section 523(a)(6) analysis is to
13 determine whether the debtor's conduct was "malicious." *Kaligh*,
14 338 B.R. at 831. In order to be found malicious, the debtor must
15 have committed a (1) wrongful act, (2) done intentionally,
16 (3) which necessarily causes injury, and (4) which is done without
17 just cause or excuse. *Id.* The last element, whether the act was
18 done without just cause or excuse, presents a mixed question of law
19 and fact. *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1105-06
20 (9th Cir. 2005), *cert. denied* 125 S.Ct. 2964 (2005). Evidence of
21 specific intent to injure can negate just cause or excuse.
22 *Khaligh*, 338 B.R. at 831.

23 Unlawful conversion of another's property may constitute a
24 willful and malicious injury. To prove conversion, the creditor
25 must prove that when the debtor converted the creditor's property,
26 he had the specific intent to deprive the creditor of the property
27 or did so knowing, with substantial certainty, that the creditor
28 would be harmed by the conversion. *Spokane Ry. Credit Union v.*

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1 *Endicott (In re Endicott)*, 254 B.R. 471 (Bankr. D. Id. 2000). The
2 creditor is entitled only to damages in the amount of the value of
3 the property converted.

4 Mr. Kim admitted that as of September of 2006, when Mr. Kim
5 and his wife executed the deed of trust in favor of plaintiff,
6 there was a discrepancy of \$13,000 in the amount of inventory he
7 had compared to what he had taken from plaintiff's warehouse to
8 sell. Mr. Kim explained that the discrepancy arose because of his
9 practice of providing samples of goods to prospective customers and
10 rewarding good customers by providing them with additional goods at
11 no cost. While this might not have been the best strategy from a
12 business perspective, it was neither "willful" nor "malicious"
13 within the meaning of the authorities cited above. In fact,
14 Mr. Kim evidenced his intention to repay the shortfall by executing
15 the deed of trust. Ex. P-4.

16 Mr. Kim also contended that the balance of the shortfall in
17 inventory returned to plaintiff resulted from two thefts of
18 inventory valued at "over \$25,000." As recited in the findings of
19 fact above, Mr. Kim provided few details about these thefts.
20 Mr. Kim's son stated that he was with Mr. Kim when one theft was
21 reported to police, but there is no evidence that Mr. Kim reported
22 the other theft to the police or anyone else. Mr. Liu testified
23 that had Mr. Kim reported the thefts, he could have recovered all
24 or some of the value of the inventory from insurance.

25 The last invoice in Exhibit P-9 is dated as of October 31,
26 2008, and shows that Mr. Kim's balance owed to plaintiff for
27 inventory and other charges was \$74,604.86, after crediting Mr. Kim
28 with the amount of inventory he returned. Plaintiff, however, did

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1 not provide any breakdown of that number or of the carryover number
2 in the first invoice in Ex. P-9, which is dated May 31, 2008. That
3 invoice indicates a carryover balance of \$63,183.86 from prior
4 periods for which plaintiff also failed to provide any breakdown.
5 Presumably that balance includes the \$23,505 amount secured by the
6 deed of trust as Mr. Liu testified that Mr. Kim never paid any of
7 that indebtedness. In addition, the invoices in Ex. P-9 include
8 approximately \$32,802 in amounts designated as Consignments, which
9 were not explained. Of that amount \$28,890 represents amounts
10 added to Mr. Kim's balance. Deducting that amount (\$28,890) and
11 the amount of the secured claim (\$23,505) from the total amount of
12 \$74,604.86, leaves a balance not accounted for of \$22,210. The
13 evidence is not clear whether this balance represents unaccounted
14 for inventory or some other charge. I find that plaintiff failed
15 to meet its burden of proving the amount of inventory that was
16 converted by Mr. Kim.

17 Plaintiff also failed to prove any willful or malicious
18 conduct by Mr. Kim with regard to the missing inventory. Although
19 Mr. Liu might believe that the thefts to which Mr. Kim testified
20 never occurred, there was no proof that Mr. Kim had converted any
21 of the inventory to his own use, or sold inventory and kept the
22 proceeds for himself. Plaintiff must prove some affirmative action
23 by Mr. Kim intended to injure plaintiff. For example, in the case
24 of *In re Foust*, 52 F.3d 766 (8th Cir. 1995), the court upheld the
25 denial of the debtor's discharge under Section 523(a)(6) where the
26 debtor had secretly converted crops which secured a government loan
27 by selling the crops to distant grain elevators and placing the
28 proceeds of the sales in his personal accounts. The debtor then

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1 fabricated reports of grain thefts to cover up his scheme. See
2 also *Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc.*, 783
3 F.2d 480 (5th Cir. 1986)(discharge of corporate president denied
4 under Section 523(a)(6) where he took proceeds of inventory sales
5 to Las Vegas in hope of winning enough money to save dealership).
6 No such showing was made in this case.

7 Mr. Kim's failure to report the thefts so that plaintiff could
8 make an insurance claim may have been negligent or even grossly
9 negligent. Even gross negligence, however, generally does not rise
10 to the level of intentional conduct required to support a finding
11 of malicious and willful injury under Section 523(a)(6). *Geiger*,
12 523 U.S. at 62-64. Plaintiff failed to show that Mr. Kim, by
13 failing to report thefts, specifically intended to cause injury to
14 plaintiff or knew that injury was substantially certain to occur.
15 Plaintiff failed to advance any alternative tortious theory
16 demonstrating Mr. Kim's responsibility for the unaccounted for
17 merchandise or intent to cause injury to plaintiff. Accordingly, I
18 conclude that plaintiff has not met its burden of showing the debt
19 nondischargeable under Section 523(a)(6).

20 D. Liability of Joon Kim.

21 Having concluded that Mr. Kim did not commit any act rendering
22 his indebtedness to plaintiff nondischargeable, any potential
23 community liability of Mrs. Kim is likewise dischargeable.

24 **CONCLUSION**

25 For the reasons stated, the Court finds that plaintiff has not
26 proved a case under any of Sections 523(a)(2), (a)(4) or (a)(6),
27 therefore the debts which are the subject of these proceedings are
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1 dischargeable in bankruptcy. Judgment will be entered in favor of
2 the defendants on all claims for relief.

3 //END OF MEMORANDUM//
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6 United States Bankruptcy Judge
7 (Dated as of Entered on Docket date above)
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